

# SHORELAND ZONING REPORT TO THE 122<sup>TH</sup> LEGISLATURE

Prepared by the Department of Environmental Protection's  
Shoreland Zoning Unit

## **Introduction**

This report is submitted to the Maine Legislature pursuant to Title 38 M.R.S.A. section 449. Section 449 requires the Commissioner of Environmental Protection to biennially report on the implementation and impact of local shoreland zoning ordinances. The report must include:

1. a description of the assistance and supervision that the commissioner has provided to the municipalities in carrying out their shoreland zoning responsibilities;
2. a summary of the shoreland zoning violations investigated by municipal code enforcement officers; and
3. any recommendations for legislation relating to shoreland zoning.

## **Program Description**

The Mandatory Shoreland Zoning Act, commonly referred to as the shoreland zoning law, was implemented in the early 1970's. The Act, as amended, requires all organized municipalities to enact ordinances relating to land use activities in the shoreland zone. The shoreland zone consists of land areas within 250 feet, horizontal distance, of the normal high-water line of great ponds, rivers and tidal waters; within 250 feet, horizontal distance, of the upland edge of freshwater and coastal wetlands; and within 75 feet, horizontal distance, of streams.

The Board of Environmental Protection (BEP) establishes minimum standards for the municipally adopted shoreland ordinances. Those minimum standards are contained in the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* (Guidelines), Chapter 1000 of the Department's rules. The Act allows a municipality to enact a different set of standards than those of the Guidelines when it documents to the Commissioner that special local conditions warrant other standards.

The Commissioner of Environmental Protection must approve all shoreland ordinances, and amendments thereto, before they become effective. If a

municipality fails to adopt a suitable shoreland zoning ordinance, the Act requires the BEP to adopt an ordinance for the municipality. The BEP-adopted ordinance is referred to as a *State-imposed ordinance*, and must be administered and enforced by the municipality just as if the municipality had adopted it.

The Department's shoreland zoning program is presently administered by three staff members; one in the Augusta office, one in the Portland office, and one in the Bangor office. For six months during the period covered by this report the Bangor position was vacant, but was filled in August of 2003. The Department's shoreland zoning unit is now more accessible to municipal officials and its field activities are now more efficiently accomplished. In 2005, the Department expects to further regionalize shoreland zoning assistance by providing additional assistance with existing staff in its Presque Isle office.

The main effort of the staff of the shoreland zoning unit is that of education and technical assistance. Enforcement may become a greater part of the Department's efforts in the coming years, but assistance and education can not be replaced with an onerous enforcement presence. Municipal boards are made up of volunteers who do not deal with land use issues on a regular basis. We believe the education and assistance efforts of staff will pay greater dividends than a threatening enforcement posture. With that said, we recognize that there are times when enforcement actions will be necessary. Thus, as noted later in this report, the Department has developed an enforcement policy for the shoreland zoning program.

### **Assistance to Municipalities**

Municipal assistance makes up the core of the Department's shoreland zoning efforts and is accomplished in numerous ways. The following are some of the activities that were undertaken during the past two-year period to assist municipalities with their shoreland zoning responsibilities.

1. Training. The Department continues to work cooperatively with the State Planning Office's *Code Enforcement Officer (CEO) Certification and Training Program*. In 2003, the shoreland zoning unit served as faculty at six day-long training sessions for code officers throughout the state. Sessions were held in Bucksport, China, Dover-Foxcroft, Machias, Poland, and Presque Isle. Each

class included a lecture session, followed by field activities related to freshwater and coastal wetlands. Classroom discussion focused on land use standards and nonconformance issues. Approximately 200 code enforcement officers attended these sessions.

In 2004, another set of day-long training sessions were held for approximately 175 code officers. This set consisted of classroom and field exercises in the towns of Falmouth, Machias, Orrington, Presque Isle and Skowhegan. Emphasis was placed on erosion control, hazard trees, and limitations on clearing of vegetation adjacent to water bodies and wetlands.

Shoreland zoning staff participated in several other training sessions pertaining to shoreland zoning issues for code enforcement officers, including the State Planning Office's multi-issues workshops in the fall of both years. We also spoke at regional code enforcement officer association meetings in Belfast, Madison, Presque Isle, and Union.

In addition, staff conducts workshops for individual towns or groups of surrounding towns to educate planning boards on shoreland zoning issues. This training may be general in nature or be specific to a particular project or application. Workshops were conducted in the following individual towns: Beals, Cutler, Dexter, Etna, Fryeburg, Glenburn, Hartland, Lebanon, Limerick, Limington, Lincoln, Lubec, Machias, Madawaska, Mariaville, New Portland, Newport, Northport, Orient, South Bristol, Southwest Harbor, Stockton Springs, Swanville, and Weston. Regional workshops were held in the towns of Frenchville and Houlton in Aroostook County.

Workshops and other educational efforts were also provided to various other interest groups, such as the Small Woodland Owners Association, several lake associations, the Congress of Lakes Association, the Androscoggin River Watershed Council, an association of land surveyors, loggers and foresters, and boards of realtors.

2. Educational Materials. The Department drafted a new educational bulletin in October of 2003. The Information Sheet titled *Establishing the Starting Point for Measurement of the Shoreland Zone and Related Setback Determinations* was drafted to assist municipal

officials and the public in determining proper setbacks and the depth of the shoreland zone. Determining coastal setbacks, in particular, has been problematic to many. It is not uncommon for code officers and the regulated community to measure setbacks from the mean high-water line, rather than the maximum spring tide level. This new bulletin, along with published tidal levels, should be helpful in getting proper measurements for shoreland proposals.

The Department has also updated three other educational pamphlets relating to shoreland zoning. The Issue Profiles: *The Mandatory Shoreland Zoning Act*; *Clearing of Vegetation in the Shoreland Zone*; and *Nonconforming Structures in the Shoreland Zone* are now current.

Another noteworthy action relating to educational materials is the addition of the Department's *Maine Shoreland Zoning – A Handbook for Shoreland Owners* to its shoreland zoning web page. This page is found at <http://www.maine.gov/dep/blwq/docstand/szpage.htm>. The handbook has been very popular and in much demand since it was first published in 1998. However, until 2004 only hard copies were available. The Department produced and distributed nearly 20,000 of these booklets to landowners, realtors, consultants and town officials. Now that it has been placed on the internet, the Department's printing and mailing costs associated with the handbook should be significantly reduced.

Town officials have received five issues of the *Shoreland Zoning Newsletter*. The Newsletter is published approximately three times a year, and serves to update town officials on changes in the program, as well as to serve as a general training tool. A copy of the most recent Newsletter is appended to this report as Appendix A.

3. Municipal Program Evaluations. In 1999 the Department began "auditing" various municipalities' administration and enforcement of their respective ordinances. In 2004, staff conducted reviews of shoreland zoning administration for the town of Cape Elizabeth and the city of Bangor. The reviews consisted of meeting with the chairpersons of the planning board and appeals board, and with the code enforcement officer. Staff found that the two municipalities are doing an adequate job of administering their respective ordinances. In

2005 the Department plans to conduct audits of the Brewer and Freeport programs.

4. Ordinance Reviews. All newly adopted ordinances and amendments to those ordinances must be approved by the Commissioner of DEP before they become effective. During the past two years the Department has reviewed 136 ordinances and amendments. Nineteen amendments to locally adopted ordinances were approved with conditions because the amendments were not fully consistent with the Department's Guidelines. One town, Centerville, voted to deorganize and is now under the jurisdiction of the Land Use Regulation Commission. Centerville was subject to a State-imposed shoreland zoning ordinance, so that ordinance is not longer necessary and has been repealed. One other town with a State-imposed ordinance, Parsonsfield, adopted an ordinance nearly consistent with the Department's Guidelines. Thus, Parsonsfield's State-imposed ordinance was repealed and replaced with a Conditional Order of Approval. There are now only 51 fully state-imposed ordinances and 3 partially state-imposed ordinances in place. The list of municipalities with state-imposed ordinances is found in Appendix B of this report.

Staff finds it noteworthy that several municipalities are adopting contract zoning provisions for areas that fall within the shoreland zone. Although this trend has been cause for some concern by the shoreland zoning staff, we have made it clear that each contract zone that involves land in the shoreland zone will be considered as an amendment to the town's shoreland zoning ordinance. Thus, each contract zone will need the formal approval of the Commissioner of the DEP.

The shoreland zoning unit also reviewed more than thirty comprehensive plans during the past two years. Staff provides comments to the State Planning Office on the respective plans as they relate to shoreland zoning issues.

5. Miscellaneous Technical Assistance. The greatest amount of staff's time is spent responding, either through site visits, written correspondence, or by telephone, to requests and inquiries from town officials and the public. Many site visits were conducted, mostly at

the request of local code enforcement officers. Staff's policy to respond to all site visit requests within 14 days of the request is well-adhered to.

Hundreds of responses to inquiries were written, and phone calls have numbered in the thousands.

Meetings with local planning boards and boards of appeals are common for the shoreland zoning staff. Most of these meetings occur during evening hours when these volunteer boards conduct their business.

### **Other Initiatives and Activities**

The Department has been an active participant in the legislatively required, Department of Conservation led, stakeholders group that is working to create a set of state-wide timber harvesting standards. The Bureau of Forestry has developed proposed standards that will be proceeding through the rulemaking process in the first half of 2005. After those rules are formally adopted, the state-wide timber harvesting standards will be incorporated into the Guidelines.

Another important project is the Department's effort to develop other amendments to the Guidelines document. In addition to addressing minor flaws, the Department is addressing some more significant issues such as: the development of standards for recreational trails; the inclusion of a newly developed point system for determining a well-distributed stand of trees in the buffer area (already incorporated into the Natural Resources Protection Act for areas adjacent to small streams); a modification to the structure setback standard adjacent to unstable coastal bluffs; and a new General Development II District with a 75 foot setback requirement, instead of a setback of 25 feet as permitted in the General Development I District. The Department expects to hold a public hearing on the proposed changes soon after the state-wide timber harvesting standards are finalized and incorporated into the draft Guideline changes.

During the past two-year period, the Department has continued its efforts to reduce the number of municipalities that do not employ state-certified code enforcement officers. Efforts involve letters to, and discussions with, town officials stressing the importance of appointing a certified code enforcement

officer. We have been successful at reducing the number from twenty to fifteen. Ten of the fifteen towns without certified code enforcement officers are from Aroostook and Washington counties. The remaining towns are in the general central Maine area. No towns south and west of Pownal and Canton are without certified code enforcement officers.

At the end of 2004 the Department began the task of digitizing the shoreland zoning maps for the towns and cities that have not already done so. We will first begin with those municipalities with State-imposed ordinances, followed by those towns with a locally adopted zoning map produced by the Department. The remaining towns that do not have their respective maps on the GIS system will then be digitized. Municipalities that already have digitized maps will be requested to forward that information to the Department to add to our computerized information. This process will not be completed in a short period but will greatly enhance our ability to provide prompt information to our customers, and will assist our licensing staff with their permitting decisions.

### **Enforcement and Permit Related Activities**

#### **1. Development of Enforcement Policy**

Over the past year the Department, working with the Office of the Attorney General, developed a *Shoreland Zoning Noncompliance Response Policy* for dealing with municipalities that fail to adequately administer local shoreland zoning ordinances, and for situations where landowners violate statutory provisions of the Mandatory Shoreland Zoning Act. Statutory limitations include: structure setback requirements; clearing of vegetation for development standards; timber harvesting standards; and a 30% expansion limitation for nonconforming structures.

The enforcement policy establishes a procedure for addressing municipal noncompliance with its shoreland zoning responsibilities. Initial Department action will include an investigation of significant allegations of municipal deficiency. When it is determined that a problem exists, Department staff will work with the municipality in an attempt to rectify the problem. Actions may range from a phone call or a meeting with the local officials, to a formal training session for the appropriate officials. If enforcement of ordinance provisions is an issue, Department staff shall offer to assist the municipality with the enforcement process. Assistance shall be in the form of a mentoring

capacity, as it is the municipality's responsibility to directly enforce its ordinance.

If the Department's efforts to assist the municipality with any documented instance of its failure to administer or enforce its shoreland zoning ordinance are not successful, the municipality will be noticed in writing, and a log of such notifications shall be kept in the municipality's shoreland zoning file. If the municipality fails to respond, or the response is not timely or adequate, that failure will become part of the record in the municipality's file, and enforcement against the municipality will be considered, consistent with factors established in the enforcement policy.

The Department has also established a procedure for addressing violations of the above noted statutory limitations in the Mandatory Shoreland Zoning Act. When the Department documents significant violations caused or contributed to by landowners or their contractors, the Department shall notify the municipality in writing of the violation, and request a written response from the municipality to the landowner detailing how it expects the situation to be addressed. The Department's correspondence must detail the minimum steps necessary for corrective action and offer guidance to the municipality as it pursues an enforcement action. The municipality shall be given a time-frame in which a response to the Department's notice is expected.

At this stage, the Department expects to be working cooperatively with municipal officers to encourage enforcement at the municipal level. Department staff may assist through actions such as meeting on-site with the violator and code enforcement officer, providing written opinions and draft Consent Agreements, and assisting with other formal enforcement documents. The Department's first priority shall be that of a mentor to municipal officials. However, the Department shall make it clear that it is authorized to proceed with formal enforcement action against the violator, should the municipality fail to resolve the violation.

If the municipality fails to take appropriate action, the Department may seek enforcement action against the violator. Possible actions include a letter of warning, a notice of violation, an administrative



consent agreement, Rule 80K proceedings, or a referral to the Office of the Attorney General. The Department shall also document the failure of the municipality to enforce its ordinance, and take any appropriate actions pursuant to its policy pertaining to municipal noncompliance.

Examples currently under consideration for enforcement action against landowners for statutory violations of the Act include the creation of a cleared opening to a great pond in northern Maine, and a 100-foot wide cleared opening to the water in a coastal town. The Department is currently monitoring the municipal actions in these matters. If the violations cannot be resolved in a reasonable time frame the Department will initiate enforcement action against the land owners, seeking a monetary penalty as well as adequate replanting of native tree species.

The new enforcement policy provides clearer direction to staff as they seek compliance from landowners and municipalities in their respective legal obligations.

2. Reports from Municipal Code Enforcement Officers Relating to Permits. Municipal code enforcement officers are required, on a biennial basis, to report to the Commissioner on their permitting and enforcement activities in the shoreland zone. The Department provides a standard form to the code officers for their reporting.

The percentage of town code officers who submitted the reports increased from 45% in 1998 to 57% in 2000, then decreased to 53% in 2002. In 2004, sixty (60) percent of the code officers submitted the report. While, overall, returns are increasing, a 60% return of the reporting forms is a rather poor response to a statutory requirement. The shoreland zoning staff is not confident in the reliability of some of the reports. Nearly fifty of the 271 reports submitted indicated that there were no permitting issues in the shoreland zone over the period of 2002 thru 2003. Thus, approximately 18% of the responding towns claimed to have had no permitted activities. This is two percent less than the 20% “no activities” reporting for 2000 and 2001. It seems unlikely that nearly 20% of the municipalities did not have shoreland zoning activities over a two-year period that required local permitting. Also noteworthy is that three code enforcement officers failed to

recollect sending in an initial report and, consequently, submitted a second report. In all three cases the second report was different than the earlier submitted report for the same period. Appendix C lists the municipalities that filed reports and includes a significant portion of the reported permit and enforcement information.

The 271 reporting municipalities indicated that 1255 new principal structures were built in the shoreland zone. This averages out to 4.6 structures per municipality, as compared to 3.8 new structures per municipality during the previous biennium, and 3.6 per municipality the prior two year period. The noted increase in the number of newly permitted structures may signal a growing need for oversight in shoreland areas.

For every five new structures permitted, one replacement structure also received a permit. This finding is consistent with past reporting data.

There were 1488 expanded structures in the shoreland zone, as compared to the 1255 new principal structures constructed. In the prior two reporting periods, the number of expansions reported was nearly double that of new principal structures. Perhaps the lifetime, 30% expansion limitation for nonconforming structures is now having an effect on the numbers of structures that are being expanded. As more structures are expanded by 30% the number remaining that can be expanded is decreasing.

The 271 towns reporting also permitted 1285 accessory structures, nearly the same as the number of principal structures permitted.

3. Reports from Code Enforcement Officers Relating to Variances. Information relating to variances is also required from the code enforcement officer, although the board of appeals is responsible for the granting of variances and administrative appeals. In 2002 and 2003 nearly 55% of the variance applications were granted. This high percentage of variances granted is reason for concern. The “undue hardship” criteria necessary for obtaining a variance is difficult to meet. Yet more than half of the variance applications were granted in the last two years. In past years the percentage of variance applications granted ranged from 38 to 48%. Even those figures are

greater than should be allowed under the current variance criteria. The Department is disappointed by what may be a trend toward the further weakening, by boards of appeals, of the requirements for obtaining a variance. We believe that the increased percentage of variance applications being approved justifies the re-adoption of the requirement that municipalities submit variance applications to the Department at least 14 days before acting on them. This request was not approved by the 120<sup>th</sup> legislature in 2001.

4. Reports from Code Enforcement Officers Relating to Enforcement.

The 271 reporting code enforcement officers investigated 1126 complaints. Of those complaints, 566 involved activities that were confirmed to be violations of the local shoreland zoning ordinance.

The vast majority of the confirmed violations were settled through informal enforcement action. Eighty-seven of the violations were resolved through more formal administrative consent agreements, while direct court actions were limited to only fifteen instances. It is clear that informal enforcement action is the preferred choice of the municipalities.

As in past years, the most common types of violations relate to excessive clearing of vegetation, expansions of nonconforming structures beyond the 30% expansion limitation, and new construction within the required setback area. Excessive cutting of vegetation appears to be the violation that occurs most frequently.

Few violations pertain to the creation of new clear-cut swaths to the water. Most shorefront property owners know that they can not create cleared openings in the buffer/setback area. However, there remains a tendency for owners to reduce the width of the buffer, and cut more trees than permitted within that remaining buffer. The Department is stressing to code enforcement officers, the need for landowners to maintain the correct buffer width and amount of remaining vegetation. We are also stressing the need for proper erosion control. We have noticed an improvement in the use of erosion control measures in the shoreland zone.

5. Enforcement Action Initiated by the Department of Environmental Protection. The Department has not initiated any formal enforcement

actions in the past two years. Consistent with our enforcement policy, however, we expect that during 2005 some enforcement actions will be taken against individuals for violations of the clearing limitations in the shoreland zone. For example, when an individual violates the clearing standards and the municipality does not adequately address the situation, the Department may initiate its own enforcement action against the individual. If there is a pattern of neglect on the part of the municipality the Department may seek a remedy against the town through a consent agreement or court action.

## **Recommendations and Related Issues**

### **1. State-wide Timber Harvesting Standards.**

The Department of Conservation is currently enacting uniform standards for timber harvesting activities in shoreland areas, including adjacent to small streams that are regulated pursuant to the Natural Resources Protection Act. When the standards are formally adopted by the Department of Conservation the shoreland zoning unit will amend its Guidelines to include the new standards. We will then conduct workshops and other informational events to inform the municipalities of the new rules and the various options the municipalities will have in addressing the new standards. (Legislative action not necessary)

### **2. Definition of Coastal Wetlands.**

Both the Mandatory Shoreland Zoning Act (Title 38 MRSA section 436-A(1)) and the Natural Resources Protection Act (Title 38 MRSA section 480-B(2)) define a “coastal wetland”. The term is defined as “all tidal and subtidal lands; all lands below an identifiable debris line left by tidal action; all lands with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous low land which is subject to tidal action during the maximum spring tide level as identified in tide tables published by the National Ocean Service. Coastal wetland may include portions of coastal sand dunes”. The use of “debris lines” to determine the upland edge of a coastal wetland is not a precise method of determining setback requirements. The Department recommends the Legislature remove the debris line standard from the coastal wetland definition, leaving the salt tolerant vegetation and the maximum spring tide criteria. Many times, the changing debris lines do not result in the accurate placement of the

upland edge of the coastal wetland for setback measurement purposes. Using a debris line that changes from storm to storm does not provide a landowner with surety that his structure will be found conforming by the town officials.

A similar problem is found in the Natural Resource Protection Act which is also setback based.  
(Legislation necessary)